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MAY 8 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1514

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOSEPH D. FONTENOT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in declining to consider petitioner's claim that a conflict of interest adversely affected his lawyer's performance at trial, where the record on appeal was insufficient to permit consideration of that claim.

2. Whether petitioner was deprived of a fair trial.

3. Whether petitioner received the effective assistance of counsel.

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OPINIONS BELOW

The district court issued no written opinion. The opinion of the court of appeals (Pet. App. 1) is reported at 628 F. 2d 921.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1980, and the petition for rehearing was denied on December 5, 1980. The petition for a writ of certiorari was filed on March 5, 1981, and was timely by virtue of a February 3, 1981, order of Justice Powell extending the time for filing the petition. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted on two counts of willfully making false statements in connection with the filing of corporate tax returns for the years

1972 and 1973, in violation of 26 U.S.C. 7206(1). The district court sentenced petitioner to six months' imprisonment on the first count and three years' probation on the second count (Pet. App. 1). The court of appeals affirmed (Pet. App. 1-10).

The evidence at trial showed that petitioner owned and operated a corporation through which he conducted the business of manufacturing and selling eyeglasses and hearing aids. The corporation operated two stores, one in Fort Walton Beach, Florida, and the other in Pensacola, Florida. At the Fort Walton Beach store, at which petitioner worked, two invoice machines were used to register daily sales. The first machine was used each day until invoices totalling approximately $200 had been recorded. At that point, all other invoices were recorded on the second machine. Only the money received with respect to the invoices registered on the first machine was entered on the corporation's books and deposited in the bank account of the Fort Walton Beach store. The invoices from the second machine were thrown away each day.[1] However, some, but not all, of the money received from the sales covered by these invoices was transferred for accounting purposes to the Pensacola store and was recorded on the corporation's books as having originated there.[2] The corporation's books reflected a total amount of invoices for the Pensacola store—*i.e.*, those that originated there and those that were transferred from the Fort Walton Beach store—that was substantially less ($25,702.81 less in 1972 and $11,053.17

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[1]Although the invoices from the second machine were thrown away by petitioner, they were retrieved by an employee, Harry Williams, each day and subsequently turned over to the Internal Revenue Service (Tr. 14). The remaining invoices were supplied to the Internal Revenue Service by petitioner during the investigation (Tr. 206-210).

[2]Harry Williams testified that petitioner retained a portion of the cash receipts that were recorded on the second invoice machine (Tr. 13-14).

less in 1973) than it would have been if *all* of the money received in connection with the invoices registered on the second machine at the Fort Walton Beach store had been transferred to and recorded at the Pensacola store (Tr. 13, 109-110, 117, 218-219).

ARGUMENT

1. Petitioner argues (Pet. 6-9) that the court of appeals erred in declining to consider his claim that the attorney who represented him at trial had a conflict of interest that adversely affected the attorney's performance at trial. The conflict of interest is said to have resulted because a member of the attorney's law firm was representing an individual who had made a claim against the estate of one Coleman Kelly—an estate in which, petitioner alleges, he or members of his family might have an interest.

Petitioner alleges (Pet. 3; Pet. App. 50-51) that he did not discover his trial counsel's asserted conflict of interest until after trial and after the notice of appeal had been filed in the instant case. Petitioner, through new counsel, filed a motion in the court of appeals (Pet. App. 11-30) to supplement the record on appeal with various documents pertaining to the probate of the estate in question. This motion was denied by the court of appeals on August 21, 1980 (Pet. App. 31). On September 10, 1980, petitioner filed another motion in the court of appeals (Pet. App. 34-39) to stay further proceedings and to remand the case to the district court to allow petitioner to file a motion for a new trial pursuant to Fed. R. Crim. P. 33 or to file a motion under 28 U.S.C. 2255 attacking his conviction on conflict of interest grounds. The court of appeals denied this motion on October 9, 1980 (Pet. App. F (after page 66)).

In its opinion affirming petitioner's conviction, the court of appeals rejected (Pet. App. 10 & n.10) petitioner's claim of ineffective assistance of counsel arising out of the alleged conflict of interest insofar as that claim was based on the

unsupplemented record on appeal. However, the court made clear (*ibid.*) that it was expressing no view about the effect, if any, that the supplemental material offered by petitioner would have on this conclusion. It therefore remains open to petitioner to renew his conflict of interest claim in the district court by means of a motion under 28 U.S.C. 2255 or for a new trial under Fed. R. Crim. P. 33, if he can establish that the information regarding the alleged conflict of interest is "newly discovered."

In these circumstances, the court of appeals plainly did not err in denying petitioner's motion to supplement the record on appeal. Even assuming, arguendo, that the material petitioner offered is accurate and would be thought to establish a conflict of interest, that material did not demonstrate the adverse effect on the lawyer's performance that must be shown to establish a Sixth Amendment violation resulting from an alleged conflict of interest. *Cuyler* v. *Sullivan*, 446 U.S. 335, 348 (1980). The effect of the alleged conflict on the lawyer's performance could be determined only after a development of all relevant facts in the district court, including an opportunity for the government to present evidence. Therefore, because the court of appeals could not have disposed of petitioner's claim in any event, the court did not err in denying the motion to supplement the record and requiring instead that petitioner present his claim to the district court in the first instance.

Nor did the court of appeals err in denying petitioner's motion to stay all appellate proceedings and remand to the district court to allow petitioner to raise his conflict of interest claim in the district court prior to disposition of his appeal. Petitioner had raised other issues on appeal, and there was no reason to delay appellate review of them while the district court considered petitioner's new claim of a conflict of interest. Indeed, if the court of appeals had reversed the conviction on other grounds, there would have

been no occasion for the court of appeals or the district court to consider this new claim. The course chosen by the court of appeals therefore resulted in an expeditious resolution of the issues properly presented on appeal, while providing for an orderly disposition of the conflict of interest claim.

2. During cross-examination, petitioner's counsel asked Harry Williams, a government witness and an employee at petitioner's Fort Walton Beach store, whether he had been told that he would not be prosecuted if he testified for the government; Williams denied that he had been told this (Tr. 40, 56, 58-59). On redirect examination, the government properly elicited from Williams an admission that he had been promised that, as a practical matter, he would not be prosecuted (Tr. 67-68). Cf. *Brady* v. *Maryland*, 373 U.S. 83 (1963). Petitioner contends (Pet. 9-11) that the trial court abused its discretion when it refused to allow counsel to conduct recross-examination of Harry Williams on this issue. The court of appeals correctly concluded (Pet. App. 7), however, that there was no abuse of discretion. Any confusion that might have resulted from Williams' testimony on cross-examination was remedied on redirect examination, and the inconsistent responses given by Williams to the defense and prosecution were before the jury even in the absence of recross-examination. Petitioner has not suggested what more could have been brought out on recross-examination. Moreover, as the court of appeals noted (Pet. App. 7) and petitioner concedes (Pet. 10), petitioner's counsel thoroughly discussed the inconsistent statements during closing argument. As a result, petitioner clearly was not prejudiced by the trial court's refusal to allow recross-examination.

3. Petitioner also contends (Pet. 15-16) that he was deprived of a fair trial because assertedly inflammatory and prejudicial evidence concerning his wife was admitted into evidence. There is no merit to this claim. The government

established that during the investigation leading to the indictment in this case, an agent of the Internal Revenue Service observed to petitioner or his representative that petitioner's standard of living appeared to exceed his reported income for the years under investigation (Tr. 87). Subsequently, petitioner, through a representative, furnished the agent with a statement explaining that the apparently excessive standard of living was due to financial gifts that Coleman Kelly had showered upon petitioner's wife in the belief that she was Kelly's daughter (Tr. 88). The government then established that Kelly had once told another individual, prior to the time petitioner married his wife, that he was planning to marry petitioner's wife (Tr. 144-145).[3] The government introduced this evidence in an attempt to show that a false statement had been made to the government during the investigation. Such evidence plainly was relevant on the issue of willfulness (see *United States* v. *Newman*, 468 F. 2d 791, 794 (5th Cir. 1972), cert. denied, 411 U.S. 905 (1973)) and hence was properly admitted.

4. Petitioner also argues (Pet. 11-14) that he did not receive effective assistance of counsel at trial, in violation of the Sixth Amendment. This argument is without merit.

For example, the record belies petitioner's suggestion (Pet. 13) that counsel did not adequately prepare the case below because he failed to consider whether there was a possible issue under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), with respect to the admissibility of a statement given by petitioner. A consideration of the statement of counsel

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[3]On cross-examination of a defense witness who had testified that Coleman Kelly was giving money to petitioner's wife, the government brought out that the witness thought that petitioner's wife was Kelly's girlfriend (Tr. 242). On cross-examination of petitioner's wife, who testified that Kelly told her that he was her father and gave her money on numerous occasions (Tr. 327, 330-332), the government asked her if she ever dated Kelly (Tr. 353). She denied that she had (*ibid.*).

upon which petitioner relies (Tr. 168) clearly reveals that the statement was prompted not by counsel's lack of awareness of the *Miranda* defense, but rather by his opinion, based on extensive conversations with petitioner, that all statements given by his client had been voluntarily made.[4] In any event, because the statement in issue was given during an interview with an Internal Revenue Service agent at petitioner's store, where he was not in custody or otherwise deprived of his liberty, there would have been no basis for a *Miranda* claim. *Beckwith* v. *United States*, 425 U.S. 341 (1976).[5] The handling of this issue therefore cannot form the basis of a claim of ineffective assistance of counsel.

Petitioner's assertion (Pet. 14) that counsel was negligent in not hiring an expert witness to testify as to matters of accounting or taxation also is without merit. Considering that the evidence conclusively proved that the tax returns were prepared from the corporate books and that the corporate books did not record all of the gross receipts, it is not apparent how an expert witness could have assisted the

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[4]Petitioner omits the italicized portion of the statement by his attorney (Tr. 168):

> *Your Honor, if I had—I've been talking with my client now for quite some time and* if I had any idea from talking to him that there had been a statement involuntarily given or no proper warning I'd have filed a motion to suppress.

The court replied: "I know."

[5]Thus, petitioner's separate argument (Pet. 16-19) that his statement should have been suppressed because he was not properly advised of his *Miranda* rights is without merit. Contrary to petitioner's assertion (Pet. 17), the mere fact that the investigation may have focused on him did not trigger the application of *Miranda*. See *Beckwith* v. *United States*, *supra*. Moreover, *United States* v. *Dickerson*, 413 F. 2d 1111 (7th Cir. 1969), relied upon by petitioner in support of his *Miranda* claim (Pet. 17-19), was expressly repudiated by the Court in *Beckwith*, *supra*, 425 U.S. at 342 & n.2.

defense. Certainly it was within the discretion of trial counsel to avoid the risk that an expert witness might have harmed petitioner more than helped him. Similarly, contrary to petitioner's assertion (Pet. 14), there was no error in counsel's refusal to insist on the presentation of extended argument on his motion for a judgment of acquittal at the close of the government's case. That motion was based on the contention that the evidence was insufficient to support a finding of guilt beyond a reasonable doubt. The court, which obviously had heard the evidence, responded that it would "not require argument" and denied the motion (Tr. 227). Petitioner has not shown how extended argument would have made a difference and has failed, at all events, to establish the insufficiency of the evidence.[6]

Finally, petitioner argues (Pet. 13) that the assistance of his attorney was ineffective because he did not request Jencks Act material in a timely fashion. In the court of appeals, this claim was limited to counsel's failure to obtain

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[6]Petitioner renews his claim (Pet. 19-22) that the evidence was insufficient to support his conviction. This contention is frivolous. As the excerpt from the court of appeals' opinion quoted by petitioner makes clear (see Pet. 19), several witnesses testified that the corporate books for the Pensacola store reflected substantially less money received than they would have if all invoices that were to have been transferred to the Pensacola store had been recorded there, and that income reported on the corporation's tax returns was substantially less than the invoice amount. Petitioner points out (Pet. 20-21) that he offered an alternative explanation of these circumstances and asks this Court to conclude that, by virtue of that explanation, "a reasonable doubt as to the defendant/petitioner's guilt was present." However, the jury was not required to believe petitioner's version of the facts. The role of a reviewing court in this situation is to view the evidence in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60 (1942), and to determine if the trier of fact reasonably could conclude that petitioner was guilty beyond a reasonable doubt. Cf. *Jackson* v. *Virginia*, 443 U.S. 307 (1979). In the present case, as the court of appeals observed, "there was more than enough evidence from which the jury could reach that conclusion" (Pet. App. 3).

Jencks Act statements of two government witnesses *before* they testified. See Brief for Appellant at 55. The Jencks Act, 18 U.S.C. 3500, affords no such right, and counsel subsequently received the requested statements (Tr. 102-104). Petitioner now also asserts (Pet. 13, 14) that counsel was ineffective in not having received a Jencks Act statement of prosecution witness Harry Williams until after Williams was excused. This claim was not raised below and should not be considered here. In any event, petitioner has not shown what the statement might have contained, much less how such a statement would have aided his attorney in cross-examining Williams or how he was prejudiced by the failure to request the statement. Especially in these circumstances, there is no occasion for the Court to consider the ineffectiveness claim as it relates to Jencks Act material.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1981